

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Preemption of Local Zoning Regulation)
of Satellite Earth Stations)
)

IB Docket No. 95-59
DA 91-577
45-DSS-MISC-93

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

COMMENTS

ACS Enterprises, Inc. ("ACS"), by its attorneys, hereby respectfully submits its Comments in response to the Notice of Proposed Rulemaking, IB Docket No. 95-59, released May 15, 1995 ("NPRM") in the above-captioned proceeding.

Introduction

ACS is a publicly-held company which, along with its wholly-owned subsidiaries, provides cable-competitive multichannel video programming service to approximately 90,000 subscribers in Philadelphia, Pennsylvania, Cleveland, Ohio, and Bakersfield, California, and surrounding areas, making it one of the largest "wireless cable" operators in the country.¹ ACS' multichannel service is transmitted to subscribers via microwave frequencies authorized for the Multipoint Distribution (MDS) and Instructional Television Fixed (ITFS) Services pursuant to Parts 21 and 74 of the Commission's Rules.

ACS applauds the Commission's proposed rule governing preemption of local restrictions on satellite receive antennas.

¹ ACS is also in the process of expanding into other wireless cable markets.

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However, ACS strongly urges the Commission to expand the scope of its rulemaking to consider federal preemption of local zoning and building code restrictions which unduly restrict the installation of all "line of sight" receive antennas, including both satellite and terrestrial microwave receive antennas. Such action is in accord with statutory and judicial law concerning the FCC's preemptive authority, and is fully consistent with the Commission's notices and orders considering preemption of local restrictions on antennas in other services. Furthermore, there is little physical distinction between satellite and terrestrial microwave receive antennas or in the receive characteristics of satellite-delivered and microwave-delivered video signals.

I. THE FCC'S PREEMPTION POLICIES SHOULD NOT DISTINGUISH BETWEEN SATELLITE-DELIVERED AND TERRESTRIAL MICROWAVE VIDEO SERVICES

ACS' ability to deliver its cable-competitive multichannel video service to subscribers depends upon installation of small microwave receive antennas on subscribers' premises. Generally, these are screen antennas two feet in diameter. Signals delivered via terrestrial microwave systems utilizing the ITFS and MDS frequencies require a "line of sight" between the transmitter and receive antenna. "Line of sight" transmission is necessary because microwave signals do not bend with the curvature of the earth and thus are deflected by intervening trees and buildings. Thus, in instances in which obstacles exist between ACS' transmitter and a subscriber's home or premises, the receive antenna must be installed on a mast high enough to circumvent these obstacles.

Often, masts of the necessary height are affected by local zoning and building code restrictions. When this occurs, ACS' subscriber (or ACS) must at the very least undergo the delay and expense of obtaining a building permit. If a building permit is denied -- and absent FCC preemption, ACS' subscriber must litigate the matter in the local courts. Because of the delay involved, such litigation generally precludes ACS from doing business with subscribers affected by overly burdensome local restrictions. Furthermore, local litigation on a widespread basis is prohibitively expensive.

For example, since June 1993, ACS has been involved in litigation with the Norristown (Pennsylvania) Zoning Board ("Zoning Board") concerning installation of two foot microwave receive antennas atop telescopic masts over twelve feet high on the roofs of subscribers' homes. Norristown has imposed thirty-five foot height restrictions in most zoning districts. Its Zoning Officer has interpreted this height restriction so that the height of the antenna and mast are added to the height of the building in determining compliance with the thirty-five foot restriction. This interpretation generally prevents construction of roof-top antennas which are over twelve feet high, and, in light of the "line of sight" necessary for microwave transmissions, interferes with ACS' provision of multichannel service.

While the Zoning Board granted a variance to ACS and its subscriber, Kevin Fackler, permitting construction of a microwave receive antenna atop a thirty foot mast on the roof of Mr.

Fackler's home, the Zoning Board upheld the Zoning Officer's interpretation of the Norristown building code to require a variance for construction of microwave receive antennas atop masts in excess of twelve feet. Based on the variance in favor of Mr. Fackler, the Zoning Board held that ACS' challenge to the ordinance was moot. ACS appealed to the Court of Common Pleas of Montgomery County (Pennsylvania), where the Court held that ACS was not aggrieved by the Zoning Board's decision. The Pennsylvania Commonwealth Court then dismissed ACS' appeal for lack of standing. ACS filed a Petition for Allowance of Appeal before the Supreme Court of Pennsylvania on May 24, 1995, which remains pending. The necessity of obtaining a variance to construct each antenna over twelve feet has had an acute adverse affect on ACS' ability to provide its cable-competitive service in Norristown.²

Because "line of sight" transmission is an essential characteristic of every wireless cable system, ACS' concern with local antenna restrictions is shared by many in the wireless cable industry. Local zoning and building code restrictions presently are severely restricting existing wireless cable operators' efforts to vigorously expand subscribership. In addition, many other wireless cable systems only recently have gone on the air or are in the final stages of construction. Once these systems are operational, local zoning restrictions such as the Norristown

² ACS is in the process of preparing a Petition for Declaratory Ruling seeking FCC preemption of the Norristown ordinance.

ordinance and building code requirements will immediately thwart these systems' ability to compete on a level playing field with traditional, "hardwire" cable.

Terrestrial microwave receive antennas are the functional equivalent of satellite receive-only antennas. Whereas satellite-delivered multichannel services are transmitted directly to subscribers' premises, "wireless cable" systems downlink satellite distributed programming at a site near the ITFS/MDS transmitting antenna and retransmit this and other programming to subscribers via terrestrial microwave transmission. From the subscriber's perspective, there is no distinction between the types of programming and programming services offered via these two delivery mechanisms. In addition, both delivery mechanisms require "line of sight" transmission and similar antenna structures. Thus, from a public policy standpoint, the FCC's preemption rules should treat satellite- and terrestrial microwave-delivered programming services in an equivalent manner.

II. THE COMMUNICATIONS ACT, FEDERAL CASE LAW AND THE FCC'S RULES AND POLICIES PROVIDE SUBSTANTIAL SUPPORT FOR PREEMPTION OF LOCAL RESTRICTIONS THAT INTERFERE WITH MDS SYSTEMS

As the Commission has noted, Section 151 of the Communications Act provides broad authority for the Commission's preemption of local laws that interfere with fulfillment of the objectives expressed by Congress in the Communications Act. See NPRM at ¶ 3, citing Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, CC Docket No. 85-87, released February 5, 1986. In addition, the FCC is authorized to "perform

any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") provides ample support for preemption of local regulations impeding development of the wireless cable service. 47 U.S.C. § 521 et seq. The 1992 Act expressed a preference for competition among multichannel video programming distributors, prohibiting federal, state or local rate regulation of a cable system where such system is subject to effective competition. 47 U.S.C. § 543 (1)(1); 47 U.S.C. § 543(a)(2). In addition, the program access provisions of the 1992 Cable Act specifically encourage an increase in competition and diversity in the multichannel video programming market. See 47 U.S.C. § 547(a).³

The Second Circuit's opinion in New York State Commission on Cable Television v. Federal Communications Commission, 669 F.2d 58 (2d Cir. 1982) ("Orth-O-Vision"), also provides strong authority for federal preemption of local regulations which restrict the MDS service. In Orth-O-Vision, the Second Circuit specifically upheld the Commission's conclusion that any state or local regulation which has the effect of reducing the number of MDS reception points -- even the number of reception points within one state -- burdens interstate development of the MDS service by increasing the per

³ The Communications Act further obligates the Commission "to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a).

viewer cost of MDS transmission. The Circuit Court further held that the FCC is not required to specifically describe state and local regulations that are preempted, rejecting arguments that the FCC's order preempting "the establishment of any policy or rule, by definition or any other device, that has the effect of limiting or adversely affecting interstate MDS service" was unconstitutionally vague. Orth-O-Vision, 669 F.2d at 66.

Finally, the FCC has ordered broad preemption of local restrictions which inhibit development of other communications services. For example, local regulations involving placement, screening or height of amateur radio antennas based on health, safety or aesthetic considerations are preempted unless they (1) accommodate reasonable amateur communications and (2) consist of the minimum regulation necessary to accomplish the local authority's legitimate purpose. Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities (Memorandum Order and Opinion), 101 F.C.C.2d 952 (1985). The FCC also exercised its substantial preemptive authority in Mobilecomm of New York, Inc., 63 RR 2d 1257 (CCB, 1987), preempting local regulation of radiofrequency interference caused by public land mobile service.

III. PREEMPTION OF LOCAL REGULATIONS IMPEDING THE DEVELOPMENT OF WIRELESS CABLE WILL SUPPORT THE COMMISSION'S OBJECTIVE OF ENCOURAGING ALTERNATIVE VIDEO SERVICES

As the Commission noted in the NPRM, overly restrictive local regulations have had a substantial adverse impact on the growth of satellite-delivered multichannel services and related programming

and equipment industries and can be expected to have a similar impact on new satellite-delivered services as they develop. NPRM at ¶ 43. Identical considerations apply to local restrictions inhibiting the wireless cable industry. The Commission has repeatedly emphasized that competition in the provision of multichannel video services to subscribers is central to its mission. See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, PP Docket No. 93-253, released June 30, 1995 (implementing competitive bidding procedures and other rules changes for MDS licensing) ("MDS Order"). Such competition cannot occur where local restrictions on receive antennas inhibit subscribers' access to multichannel services other than traditional cable systems. Thus, in accordance with the policy principles set forth in the MDS Order, the Commission should promptly implement rules preempting overly burdensome local zoning and building code regulations restricting the growth and development of wireless cable systems.

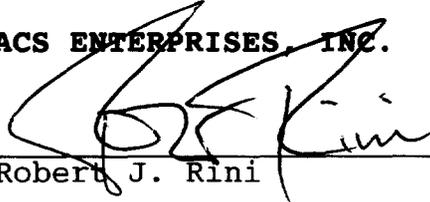
Conclusion

Accordingly, ACS respectfully submits that the Commission expand the focus of its current rulemaking proceeding in order to establish a comprehensive scheme governing preemption of local zoning and building code restrictions which impede competition in the multichannel video market.

Respectfully submitted,

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July 14, 1995
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CERTIFICATE OF SERVICE

I, Victor Onyeoziri, with Rini & Coran, P.C., do hereby certify that I have this 14th day of July, 1995 caused to be delivered by hand the foregoing "Comments" to the following:

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